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Abstract: This paper seeks to investigate, through the jurisprudence of the European Court of Human Rights ECtHR and the Court of Justice of the European Union (CJEU), the notion of procedural public order, as a principle of guarantee and respect for the principles of procedural nature where through the right of defense that enters the space and circle of the fair trial constitutes the relative limits that remain in force for the obstacle of the effects, in the European judicial space as fundamental procedural guarantees. Both courts, as is obvious and natural, have maintained a restrictive attitude to the exception of procedural public order, intervening to guarantee the examined rights of the European Convention of Human Rights, ruling according to the principle of mutual recognition. On a jurisdictional level, the European Union appears capable of autonomously ensuring the protection of fair trial rights. It will be necessary to verify the obligations that the interpretation provided by the CJEU has imposed on national judgments where

procedural public order is a valid reason for the refusal of recognition or enforcement of a foreign judgment.

Keywords: procedural public order; defense's rights; fair trial; judicial cooperation in civil matters; European Union law; mutual recognition.

Introduction

Public order as a notion of national law has been “transferred” through the jurisprudence of the CJEU also within the scope of the European Union (EU) with the aim of guaranteeing compliance with procedural principles as well as the right of defense as a limit to the free circulation of decisions in the European judicial area.

It makes no sense to speak generally about public order in the European context, nor to recall some sentences reported by the CJEU. Our objective is to analyze and investigate the notion of public order through defense law which is part of the “family” of general law, called fair trial. Right of defense to ascertain the compatibility of the rules of a procedural nature especially of the foreign legal system and as a guarantee of the right to act and contradict rights when the right of defense with the procedural public order of the member state is requested. The logical

question is whether this law arises and evolves from a procedural point of view?. Jurisprudence is also the basis between the law of the CJEU and the European Court of Human Rights (ECtHR) with regard to the cases in which the latter had to rule on the rights included in Art. 6 of the European Convention of Human Rights (Sudre, 2021) as well as the principle of mutual recognition (Xanthopoulou, 2020).

The construction of a framework of civil judicial cooperation with transnational implications has an important significance in the context and factor of mutual trust which imposes a restrictive use of the reasons hindering the recognition and execution of any type of circulation of judicial "products" in the European space of freedom, security and justice, as an important and evaluative place of shared values and legal principles (Rubio, Victoria, 2020)[1].

As we see, the jurisprudence is broad and multi-coloured which requires each national judge to invoke procedural public order as a reason for impeding and denying the recognition or enforcement of a foreign decision.

1CJEU, C-490/20, Stolichna obshtina rayon "Pancharero" of 14 December 2021, ECLI:EU:C:2021:1008, not yet published. Tryfonidou, A. (2021, December, 21). The cross-border recognition of the parent-child relationship in rainbow families under EU Law: A critical view of the ECJ's V.M.A. ruling. *Europeanlawblog*, 2021, https://europeanlawblog.eu/2021/12/21/the-cross-border-recognition-of-the-parent-child-relationship-inrainbow-families-under-eu-law-a-critical-view-of-the-ecjs-v-m-a-ruling/

It is true that public order constitutes an insurmountable border in the European context, under certain conditions for the recognition and enforcement of decisions between member states. The normative data constitutes the articles that regulate the reasons hindering the recognition and execution of the decisions contained in the regulations of international civil procedural law as a fundamental right playing a stronghold and nomophylactic role which takes place through the jurisprudence of the CJEU and ECtHR establishing the conditions to which the courts can resort to public policy to deny access to a foreign decision. So is it a national procedural right to safeguard national law or a right that has as its purpose the double evaluation of a sentence and at the same time the protection of EU law?

It is clear that we are talking about a sort of variable geometry that regulates the intra-community circulation of decisions due to the matter defined in every act of European international civil procedural law but above all to the lack of solid previous discipline for some of them. Given that the exequatur has been abolished for some matters, on the other hand, some specific reasons of an impeding nature to the recognition and enforcement of decisions issued by another Member State remain in place.

The procedural aspects that constitute the institution in question are aimed at guaranteeing the right of defense of the defendant where he becomes the requested and/or executed subject and procedures are necessary with the recognition or execution of a decision in a member state other than the one in which it was issued. Respect for procedural guarantees also suggests other different impediment reasons where the refusal to recognize or execute a default decision pronounced in case of violation of the rights of defence.

For the purpose of a useful and effective defense, as an obligation to motivate the decision, is the affirmative line of the sentences of the Court of Strabsourg, where is formally seen in the jurisprudence of recent years. Obviously, through arguments, both courts agree in stating that the motivation represents a tool that evaluates the logical process that the judge follows to reach the final decision. The Court of Stasbourg has oriented itself in its decisions on motivation as an indefeasible element of procedural fairness and the CJEU has highlighted its instrumental nature for the exercise of the defense where its absence does not allow the party to exercise its right to appeal.

The jurisprudence of the CJEU even before the interpretation of Art. 27 of the Brussels Convention of 1968 and after Art. 34 of Regulation EC n. 44/2001 as well as today Art. 45 of Regulation EU n. 1215/2012 (Liakopoulos, 2019) emerges as a greater

achievement of worthy and efficient objective for a speedy administration of justice that does not limit or annihilate the fundamental principle of respect for the right of defense to a fair trial[2].

The procedural aspects and the right of defense constitute that type of segment of public order that is affected by the nomophylactic role played by the CJEU with the aim of facilitating the development of the principle of mutual recognition of civil and commercial decisions as a cornerstone and foundation of cooperation of judicial proceedings in civil matters among the Member States of the EU (Rizcallah, 2020). It will be interesting to try and carry out a transversal type of investigation of the procedural public order and of the autonomous and distinct impeding reasons as a type of recognition and execution, directing it within the context of the fair trial.

The mutual recognition of judicial and extrajudicial decisions constitutes the fulcrum of the cooperation policy and on the other hand implements the principle which encounters a limit in the right to effective judicial protection which is guaranteed by Art. 47 of the Charter of the Fundamental Rights of the European Union (CFREU) with a concrete way as a guarantee of respect for defense rights (Frantziou, 2018; Lörcher, 2019;

2CJEU, C-49/84, Leon Emile Gaston Carlos Debaecker of 11 June 1985, ECLI:EU:C:1985:252, I-01779, par. 10.

Rubio, Victoria, 2020)[3].

As regards mutual recognition, it is a principle connected with the need to ensure the right of access to justice, including the right to a fair trial. In the analysis of the respective provisions of the instruments, the uniform international procedural law that operates in the European Union is inherent to the circulation of decisions and carries out, through the jurisprudence of the CJEU, the remedies to be tried against the recognition and execution of the same impediment reasons to be invoked thus emerging as an expression of balancing opposing interests. A question arises relating to the recognition and/or enforcement of a decision in a Member State other than the one in which it was issued. A balance will have to be made from time to time between free movement and the protection of a nucleus fundamental rights that fall within the broader category of fair trial and which cannot be compressed. This excludes the principle of mutual recognition which has absolute value and which requires subjecting it to limitations that are consistent with the protections ensured by Art. 47 CFREU which also protect the rights of defence. It should also not be overlooked that the CJEU and the ECtHR concern the scope of operation of the states belonging to the European judicial space and that they

3CJEU, C-414/16, Egenberger of 17 April 2018, ECLI:EU:C:2018:257, published in the electronic Reports of the cases. C-261/20, Thelen Technopark Berlin of 18 January 2021, ECLI:EU:C:2021:33, not yet published; C-896/19, Repubblika of 20 April 2021, ECLI:EU:C:2021:311, not yet published.

maintain a restrictive approach to the exception of procedural public order as a limit to the circulation of decisions.

Within this context it is understood that the jurisprudence of CJEU and ECtHR operates as a guarantor of fundamental rights in states that belong to the European judicial area with the final objective of greater circulation of sentences within the European context.

Mutual recognition, procedural public order and civil judicial cooperation

The constantly evolving jurisprudence of both the CJEU and the ECtHR has had as its objective, in our interpretative opinion, to concern the principles extendable to the entire European legal system in terms of fundamental rights, as well as specific aspects such as the methods of development of civil judicial cooperation through the principle of mutual recognition. The main basis of the mutual recognition is mutual trust between Member States. Judicial and extrajudicial decisions as well as related acts are not susceptible to recognition and/or enforcement in Member States other than the one in which they were adopted and if there was no mutual trust. It operates within a circle of equivalence between national legal systems and is attenuated by different material and procedural regulations. Mutual recognition depends on the automatic and/or semi-

automatic nature accompanied by the standardization of skills and applicable conflict rules, creating in the sectors and producing results that have been achieved within a substantially unitary legal space, attributing an exceptional character to the hypotheses in which legitimate occur reasons for refusal of recognition. The desire for judicial cooperation in civil matters with a transnational character as well as the principle of mutual recognition are materialized in the mutual recognition of judicial and extrajudicial decisions (Blanke, Mangiamelli, 2021)[4]. They are represented as a means through which in a particular way (Blanke, Mangiamelli, 2021)[5] the Union "facilitates access to justice" (Blanke, Mangiamelli, 2021)[6]. This type of cooperation allows the adoption of measures aimed at first of all approximating the regulatory legislations of the Member States as well as:

"(...) the mutual recognition between the Member States of judicial and extrajudicial decisions and their enforcement as has been introduced with the Lisbon reform".

The principle of mutual recognition, which is based on mutual trust between the respective internal systems, is an "integral" element of freedom of movement. Moreover, the fundamental rights of citizens complete the European system of judicial protection and the effectiveness of Union law in matters of law (Liakopoulos, 2019; Rubio, Victoria, 2020).

4Art. 81, par. 1, TFEU.
5Art. 67, par. 4, TFEU.
6Art. 67, par. 4, TFEU.

It is highlighted that in recent years the improvement of judicial cooperation in the area of freedom, security and justice has been based on a continuous strengthening of the protection of fundamental rights in a multilevel system and in a substantial but also procedural sense. As a consequence, procedural guarantees have been "denationalized" guaranteeing greater legal certainty in the approximation of both civil and criminal procedural systems. Within this context, the principle of mutual recognition operates without however acting in compliance with the provisions of Art. 6 TEU that recognizes the rights, freedoms and principles established by the CFREU, as well as the fundamental rights of the ECHR resulting from the constitutional traditions common to the Member States (Blanke, Mangiamelli, 2021)[7].

Access to justice and rights of defense are among them. On the one hand, mutual recognition in civil and commercial matters has found greater expression through the abolition of the exequatur procedure as adopted by Regulation EU no. 1215/2012, protecting fundamental rights which have some specific limits to the circulation of decisions as impregnable bulwarks[8]. The path of the process of simplification of the

7Art. 67, par. and 6 TEU.

8CJEU, C-681/13, Diageo Brands BV v. Simiramida-04 EOOD of 16 July 2015, ECLI:EU:C:2015:471, published in the electronic Reports of the cases, par. 41. C-157/10, Prism Investments BV v. Jaap Anne van der Meer of 13 October 2011, ECLI:EU:C:2011:653, note yet published, par. 33. C-157/12, Salzgitter Mannesmann Handel GmbH v. SCLaminorul SA of 26 September 2013, ECLI:EU:C:2013:597, published in the electronic Reports of the cases, parr. 28 and 39.

regime of circulation of decisions with free and homogeneous way in the various sectors of civil cooperation and the impeding reasons (Schlosser, 2010) that have to do with the circulation of existing documents such as the EU Regulation no. 1215/2012 on jurisdiction, recognition and enforcement of decisions in civil and commercial matters and the EU Regulation no. 2015/848 (Mc Cormack, Keay, Brown, 2017)[9] relating to insolvency procedures, which have abolished the exequatur procedure, both for those acts which still do not have very delicate and very personal rights protected and which operate towards the total abolition of said intermediate procedure. These are regulations that operate in specific sectors[10].

In particular, in Regulation CE n. 2201/2003 (Caamiña Domìnguez, 2011; Storme, 2012; Cuniberti, 2014; Van Ballegooi, 2015; Pfeifer, 2016; Thöne, 2016; Hamed, Tatsiana, 2016)[11] which from 1 August 2022 was replaced by EU

9Regulation (EU) no. 848/2015 of the European Parliament and of the Council of 20 May 2015 relating to insolvency proceedings (Recast), in OJ EU, L 141, of 5 June 2015, p. 19. Annexes A and B have recently been replaced by Regulation (EU) no. 2021/2260 of the Parliament and of the Council of 15 December 2021, amending Regulation (EU) 2015/848 relating to insolvency procedures in order to replace annexes A and B, in OJ EU, L 455, of 20 December 2021, p. 4.

10Regulation no. 2015/484/EU, EU Regulation no. 2019/1111 (Recast of EC Regulation n. 2201/2003), EC Regulation n. 4/2009 the regulations n. 2016/1103/EU and 2016/1104/EU, the EU Regulation n. 650/2012. See also in argument: CJEU, C-501/20, MPA of 24 February 2022, ECLI:EU:C:2002:138, not yet published. C-638/22 PPU, Rzecznik Praw Dziecka and others, ECLI:EU:C:2023:21, not yet published.

11Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. A proposal for a revised Regulation was adopted by the European Commission on June 30, 2016. Proposal for a Council Regulation on jurisdiction, the recognition and

Regulation no. 2019/1111[12] (Recast), the exequatur procedure remains:

"(...) with the exclusion of decisions regarding the right of access and the return of the minor for which the intermediate procedure had already been abolished. This procedure is abolished in Regulation CE n. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, only with respect to decisions given in a Member State bound by the 2007 Hague Protocol on Applicable Law to maintenance obligations (…)" (Bauguiet, Dechams, Mary, 2016)[13].

The procedure in EU regulations no. 2016/1103 (Wysocka-Bar, 2019)[14] and 2016/1104[15] have as their object the regulation of

enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final. See also in argument: CJEU, C-572/21, CC of 16 September 2021, ECLI:EU:C:2021:562. C-603/20 PPU, MCP of 24 March 2021. ECLI:EU:C:2021:126; C-422/20, EK (Dèclinatoire de compètence) of 09 September 2021, ECLI:EU:C:2021:718, all the above cases are not yet published.

12EU Regulation no. 2019/1111 of the Council of 25 June 2019, relating to jurisdiction, recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility, and international child abduction (recast), in OJ EU, L 178, of 2 July 2019, p. 1.

13Council Regulation n. 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2008 O.J. (L 7) 1. This Regulation is applicable via Regulation 1107/2009, art. 15, 2009 O.J (L 3069) 1, (EC). See from the CJEU: joined cases C-400/13 and C-408/13, Sophia Marie Nicole Sanders v. David Verhaegen and Barbara Huber v. Manfred Huber of 18 December 2014, ECLI:EU:C:2014:2461, published in the electronic Reports of the cases. C-555/18, K.H.K. of 07 November 2019, ECLI:EU:C:2019:937, published in the electronic Reports of the cases. C-41/9, FX (Opposing enforcement of a maintenance claim) of 4 June 2020, ECLI:EU:C:2020:425, not yet published. C-501/20, MPA of 01 August 2022, ECLI:EU:C:2022:619, not yet published.

14Regulation (EU) 2016/1103 of the Council of 24 June 2016, which implements enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes, in OJEU, L 183 of 8 July 2016, p. 1. see also the next cases in argument: CJEU: C-249/19, JE of 16 July 2020, ECLI:EU:C:2020:570, not yet published. C-386/17, Liberato of 16 January 2019, ECLI:EU:C:2019:24, publihsed in the electronic Reports of the cases. C-558/16, Mankopf of 1st March 2018, ECLI:EU:C:2018:138, published in the electronic Reports of the cases.

15Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered

property regimes between spouses and in registered partnerships remains, as does EU Regulation 650/2012[16] regarding cross-border successions. These Regulations have maintained the exequatur procedure in a simplified manner as can be seen for example in the old Regulation Brussels I.

The EC Regulation n. 805/2004 (Pèroz, 2005; Sadler, 2005; D'Avout, 2006)[17] established the European enforcement order for uncontested credits and was the first result of the simplification orientation which I believe speeded up the execution of decisions. The exequatur procedure has been abolished by the regulations that apply uniform civil procedures such as: the Regulation EU n. 1896/2006 on the European payment order procedure according to which the injunction has become enforceable and circulates and is enforced under the same conditions as the injunction pronounced in the Member State of enforcement; the Regulation EU n. 861/2007 (Eichel, 2014; Bobek, 2015; Gruber, 2016; Durovic, 2016; Hazelhorst,

partnerships, OJ L 183, 8.7.2016.

16Regulation (EU) 650/2012 of the European Parliament and of the Council, of 4 July 2012, relating to jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession, OJEU, L 201 of 27 July 2012, p. 107. See also: CJEU: C-646/20, Senatsverwaltung für Inners und Sport of 15 September 2022, ECLI:EU:C:2022:879, not yet published. C-617/20, T.N. and N.N. of 2 June 2022, ECLI:EU:C:2022:426, not yet published.

17Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. CJEU: joined cases C-400/13 and C-408/13, Sophia Marie Nicole Sanders v. D. Verhagen and B. Huber v. M. Huber of 18 December 2014, ECLI:EU:C.2014:2361, published in the electronic Reports of the cases. C-722/17, Reitbauer and others of 10 July 2019, ECLI:EU:C:2019:577, published in the electronic Reports of the cases.

2017; Jelinek, Zangl, 2017)[18] which establishes a European procedure for small claims; EU Regulation no. 655/2014 (Palao Moreno, Alonso Landeta, Buìgues, 2015; Muleiro Parada, 2015; Fernàndez Rozas, 2016; Cuniberti, Migliorini, 2018; Golak, 2019)[19] which establishes the procedure for the European order for the preservation of bank accounts.

18Regulation (EC) No 1896/2006-creating a European order for payment procedure. See from the ECJ the next cases: C-508/12, Walter Vapenik v. Josef Thurner of 5 December 2013, ECLI:EU:C:2013:790, published in the electronic Reports of the cases; C-300/13, Imtech Marine Belgium NV v. Hellenic Radio SA of 17 December 2015, ECLI:EU:C:2015:188, published in the electronic Reports of the cases, which the CJEU has declared that: "(...) certification is a measure of a judicial nature and is therefore reserved to the Court, and that is necessary to distinguish between the certification of a decision as the European enforcement order itself and the formal act of issuing the certificate and in particular the model contemplated by art. 9 of the rules of procedure (...)". C-511/14, Pebros Servizi Srl v. Aston Martin Lagonda Ltd v. Aston Martin Lagonda Ltd of 16 June 2016, ECLI:EU:C:2016:448, published in the electronic Reports of the cases, which the CJEU has stated that: "(...) the default judgment was to be counted among the executive title that were to be certified as a European enforcement order, even if it could not, in fact, to be certified as a European enforcement order the pronouncement pronounced in absentia when it was impossible to identify the domicile of the defendant also for the purposes of notification (...)". And in case of monitor process see: C-133/12, Goldbet Sportwetten v. Massimo Sperindeo of 13 June 2013, ECLI:EU:C:2013:105; C-215/11, Iwona Szyrocka v. SiGer Technologie GmbH of 13 December 2012, ECLI:EU:C:2012:794; joined cases C-119/13 and C-120/13, Eco Cosmetics GmH v. Virgine Laetitia Barbara Dupuy and Tetyana Bonchyk of 4 September 2014, ECLI:EU:C:2014:2144; C-245/14, Thomas Cook Belgium NV v. Thurner Hotel GmbH of 22 October 2015, ECLI:EU:C:2015:715; C-94/14, Flight Refund Ltd vs. Deutsche Lufthansa AG of 10 March 2016, ECLI:EU:C:2016:148, the above cited cases published in the electronic Reports of the cases. C-198/18, CeDeGroup of 21 November 2019, ECLI:EU:C:2019:1001, published in the electronic Reports of the cases; C-581/20, TOTO of 06 Octoher 2021, ECLI:EU:C:2021:808, not yet published.

19Regulation (EU) no. 655/2014 of the European Parliament and of the Council, of 15 May 2014, which establishes a procedure for the European order for the preservation of bank accounts in order to facilitate the cross-border recovery of debts in civil and commercial matters, in OJEU, L 189 of 27 June 2014, p. 59. This Regulation has been applicable since 18 January 2017. The relevant forms to be filled in to obtain the issuance of the European order for the conservative seizure of bank accounts are contained in the Implementing Regulation (EU) no. 2016/2823 of the Commission, of 10 October 2016, in OJEU, L 283 of 19 October 2016, p. 1. This refers to the already examined Regulations establishing: the European enforcement order, the European order for payment, the procedure for small claims and the

The main aim is to pursue the maintenance of the so-called impeding reasons and that of preventing the introduction in the requested member state of a decision that conflicts with the fundamental values aimed at guaranteeing the harmony and coherence of the state system from a substantive and procedural point of view. Another aspect is the instrumental autonomy which respects substantial public order and which begins to assume this type of autonomy especially in consideration of Art. 6 ECHR also carrying out Art. 6 TEU and Articles 47 and 53 CFREU (Grynchak, Tavolzhanska, Grynchak, et al. 2022).

Art. 45 of the EU Regulation n. 1215/2012 (Liakopoulos, 2019), as a reason impeding the circulation of decisions blocked by procedural public order, is governed by secondary law acts which require:

"(...) the judge of the requested state (through a so-called ex post control) to examine if the decision in question was rendered in absentia, if the judicial request or an equivalent document were not notified or communicated to the defendant in good time and in such a way as to be able to present his defence, except if, despite having had the possibility, he has not challenged the decision (...)"[20].

In Regulation EU no. 805/2004 the control:

"(...) and compliance with the methods of notification of the document initiating the proceedings which led the formation of the decision constituting the European enforcement order to be implemented-contrary to EU Regulation no. 1215/2012-by the judge of the state of origin on the basis of minimum standards developed at a supranational level. This is the guarantee of a fair trial and of the right of cross-examination, with reference to the

European order for attachment. See from the CJEU: C-379/19, Società Immobiliare Al Bosco of 4 October 2018, ECLI:EU:C:2018:806, published in the electronic Reports of the cases. C-555/18, K.H.K. of 07 November 2019, op. cit.

20Art. 46.

provisions of Art. 47 CFREU (...)"[21].

These are minimum rules for exceptional cases which allow the relevant suspension of execution, especially in the case of a request for rectification or revocation. They thus respond to the need to guarantee respect for procedural public order.

Art. 18 of the EC Regulation n. 861/2007 (rewritten and expanded by EU Regulation no. 2421/2015) protects:

"(...) the defendants in cases where they have not been placed in a position to participate in the proceedings or to have sufficient time to prepare their own defense (…)" (Liakopoulos, 2019).

Art. 33 of EU Regulation no. 2015/848 is identified:

"(...) in public order and in particular in the fundamental principles and personal rights and freedoms enshrined in the constitution of the requested state". The scope of application and the content of said article also concern the procedural aspects of public order. Reference can be made to the jurisprudence of the CJEU issued under the validity of the previous EC Regulation no. 1346/2000 (…)" (Liakopoulos, 2019).

In relation to family law, respect for the rights constituting procedural public order is found in Art. 22, letter. b) Regulation EU n. 2210/2003 corresponding to Art. 38, letter. b) of EU Regulation no. 2019/1111 Recast, in Art. 23, letter b) and c)[22] for decisions regarding parental responsibility[23]. The impeding

21See the recital n. 11 and n. 12 of the Regulation EC n. 805/2004.

22Corresponding to Art. 39, lett. b) and c) of the Recast.

23Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM/2022/695 final. According to art. 31: "(…) the reasons of refusal of recognition are the following: (a) taking into account the interests of the children, the manifest opposition to the public order of the Member State where it is invoked; (b) failure to serve or communicate the writ or other document equivalent to the defendants in default in good time, or the adoption of a decision in absentia; (c) failure to listen to the individual in making the judicial decision, withheld harmful to one's paternity or maternity of the child (at the request of the person concerned); (d) incompatibility of the decision with a judicial decision of parentage subsequently rendered in the

reason for procedural public order is governed by Art. 24, letter b) Regulation EU n. 4/2009 relating to maintenance obligations and Art. 37, letter b) Regulation EU n. 2016/1103 which regulates the matter of marital property regime as well as Art. 37, letter b) EU Regulation n. 2016/1104 relating to the patrimonial effects of registered unions. Procedural public order constitutes a valid reason for refusal for the recognition and execution of decisions regarding cross-border successions, i.e. according to Regulation EU n. 650/2012 which is specifically regulated by Art. 40, letter b).

Ultimately, as we can understand, public order is a "particular" defense mechanism of a state in the face of situations with extraneous elements and its own recognition of a foreign sentence even in the context of mutual recognition could undermine the fundamental values of sorting. The complexity of the debate that crosses time and space is not exhausted by observing that public order influences and interferes with supranational systems such as the system of protection of fundamental rights of the ECtHR and of CJEU. Yes, it is a attenuated public order and a method of recognition linked to the protection of human rights as a cum grano salis of an effective public order and attenuated to the traditional limits of

Member State where recognition is sought; (e) incompatibility of the decision with a judicial decision of filiation subsequently rendered in another Member State, provided that it satisfies the conditions required for recognition in the Member State in which recognition is sought (…)".

private international law (Lagarde, 2014).

Principle of equivalent protection: procedural public order and fair trial

We repeat that the free circulation of decisions is based on the recognition and execution with a simplification and acceleration of said circulation, not being able to protect the fundamental rights that are provided for by the CFREU and by the ECHR and also consecrated by the jurisprudence of the CJEU which takes a position that is the need to balance enforcement with the protection of the person's rights. The autonomy of the procedural law of states cannot ignore respect for fundamental rights and principles. The path of state sovereignty guaranteed by the exequatur is now outdated and the need to ensure a fair trial also in the executive phase arises.

Art. 45, letter b) Regulation EU n. 1215/2012 present the special impeding reasons as well as the respective reasons indicated in the other acts of European international civil procedural law which do not prevent the various violations of fair trial and which fall within the notion of procedural public order given that the same acts are interpreted by the same jurisprudence of the CJEU. The fair trial thus arises as a parameter to evaluate the compatibility of the foreign trial that has to do with the procedural public order of the requested state.

In speciem the ECtHR reiterated that:

"(...) the principle according to which the execution of decisions must be considered an integral part of the "process" pursuant to art. 6 of the Convention, as the procedures aimed at the recognition and enforcement of decisions are also subject to the principles that characterize due process (...)" (Savvidis, 2016; Hazelhorst, 2017; Villiger, 2023)[24];

the decision to execute a foreign judgment (exequatur) is incompatible with the requirements of Article 6, par. 1 if it was adopted without granting the possibility of effectively asserting- in the state of origin or in the requested state-a complaint relating to the unfairness of the procedure with which that sentence was adopted

"the general principle according to which a court that examines a request for recognition or enforcement, or opposition to the same, of a foreign decision cannot accept it without having previously carried out a certain re-examination of the decision in question, in light of the guarantees of a fair trial. The intensity of this review may vary depending on the nature of the case (...)"[25].

Instead, in the same spirit, the court of Strasbourg observed that:
"(...) the recognition and execution by a state of a sentence pronounced in another state makes it possible to ensure legal certainty in international relations between private individuals[26] (...) anyone who has a legal interest in the recognition of a sentence pronounced abroad must be able to submit a request to this end (...) the rules limiting the legitimacy to act for exequatur constitute a violation of the right of access to a court (…)" (Izarova, Flejszar, Vebraite, 2019)[27];

24ECtHR, Hornsby v. Greece of 19 March 1997; par. 40; Lunari v. Italy of 11 January 2001, par. 42; De Trana v. Italy of 16 October 2007, par. 36; Efendiyeva v. Azerbaijan of 25 October 2007, par. 55; Vrbica v. Croatia of 1st April 2010, par. 61.

25ECtHR, Pellegrini v. Italy of 20 October 2001, par. 40.

26ECtHR, Ateş Mimarlik Mühendislik A.Ş. v. Turkey of 25 September 2012, par. 46.

27ECtHR, Selin Aslı Öztürk v. Turkey of 13 October 2009, parr. 39-41; Sa Patronale Hypothécaire v. Belgique of 17 July 2018, par. 38. Polyakh and Others v. Ukraine and others of 17 October 2019, 186-192. Stanev v. Bulgaria of 17 January 2012, par. 248. Zubac v. Croatia, 5 April 2018, par. 84. Nataliya Mikhaylenko v. Ukraine of 30 May 2013, par. 40; Rosiianu v. Romania of 24 June 2014, par. 35. Oleksandr Volkov v. Ukraine of 9 January 2013, par. 87-91. Baka v. Hungary of 23

there is an "indirect" violation of art. 6 ECHR as a result of the recognition of a foreign decision; when this happens, it is necessary for the state party in which the decision is to be executed, ascertains that the foreign sentence was issued in the context of a proceeding in which the principles of fair trial were respected (Izarova, Flejszar, Vebraite, 2019). Position and thesis confirmed as a principle that was expressed in the old Pellegrini v. Italy[28]case, where it was stated that:

"(...) the assessment of the "merit" in order to evaluate whether, the Italian judges decided on the declaration of effectiveness in Italy of an ecclesiastical sentence with which the marriage, have effectively ascertained the existence of the conditions for the recognition and execution of the foreign judgment established by the procedural law of the requested state. The Court did not appear to place emphasis on the distinction between the enforcement of decisions issued by a contracting party or by a state which is not a party to the Convention (…)" (Kinsch, 2005).

The same principles were also noted in Avotiņš v. Latvia (Marguery, 2017; Jelinić, Knol Radoja, 2018)[29], in which the judges followed a path of ruling on:

"(...) "indirect" protection of the principles of fair trial in the context of a judgment of recognition and enforcement of a foreign judgment governed by European Union law (...) in the context of the mutual recognition of civil decisions in the European Area of Justice, with particular reference to the relevant discipline set out in Regulation EC no. 44/2001 (now Regulation EU no. 1215/2012) (…)".

It is applicable the principle of the presumption of equivalence of the protection of fundamental rights, as developed for the first time by the European Court itself in the Bosphorus v. Ireland case (Costello, 2006; Lock, 2010; Spielmann, 2013; Lacchi,

June 2016, par. 100-106. Truckenbrodt v. Germany of 30 June 2015.

28ECtHR, Pellegrini v. Italy of 20 October 2001, par. 40.

29ECtHR, Avotiņš v. Latvia of 23 May 2016.

2015; De Vries, Bernitz, Weatherill, 2015; Negrelius, Kristoffersson, 2015; Jakubowski, Wieczyńska, 2016; Büyükbay, Ertin, 2017; Sakara, 2021)[30], ensured by European Union law compared to that guaranteed by the ECHR in a sector, such as civil judicial cooperation, based on respect for the principle of mutual trust between Member States and, therefore, of the reviewability of community rules (in this case Art. 34, no. 2 Regulation no. 44/2001) in light of the principles established by the Convention[31].

As can be understood from the first lines of jurisprudence, the legal path of a guarantee always compatible with Art. 6, par. 1 ECHR according to the obligation to ensure the free circulation of decisions in civil and commercial matters in the European judicial area:

"(...) the Member States have delegated part of their sovereignty to the European Union to guarantee this principle through the observance of the reasons impeding the recognition and execution imposed by acts of secondary law (…)" (Halberstram, 2015; Krenn, 2015; Eckhout, 2015; Wessel, Łazowski, 2015; Glas, Krommendijk, 2017)[32].

A state that fulfills the obligations belonging to the Union does not violate the ECHR and can only be overcome if the ECtHR considers it to be a manifest lack of protection of the European

30ECtHR, Bosphorus v. Ireland of 30 June 2005.

31In the Bosphorus v. Ireland case the presumption of equivalence of the protection of fundamental rights concerned the application of substantive provisions of EU law instead in the Avotiņš v. Latvia case the presumption of equivalence operates in relation to secondary legislation which facilitates the "circulation" of decisions.

32Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECJ, 18 December 2014, ECLI:EU:C:2014:2454.

system in a specific sector protected by the rules of the ECHR[33]. The principle of the presumption of equivalent protection in the legal system of the European Union was based and oriented on two conditions: the lack of room for maneuver of the national authorities and the development of a supervisory mechanism which was provided for by EU law (Lachy, 2015; Negrelius, Kristoffersson, 2015; Büyükbay, Ertin, 2017)[34]. A certain respect for this condition is recognized. Instead, in the Avotiņš case it was discussed whether the Regulation which leaves little margin of discretion to the states and the related impeding reasons which are provided for by Art. 34 of the Regulation EC n. 44/2001 allow the refusal of recognition and as a consequence also of execution but only in specific cases given that in the case in question:

"(...) there is no discretionary power and this constitutes a greater guarantee regarding the respect of fundamental rights (...)"[35].

The EU has offered equivalent protection to the ECHR since it allows individuals to directly assert before the national courts the failure of the Member State to fulfill an obligation deriving from EU law. Thanks to the Regulation, the possibility of submitting a question of interpretation, rectius validity before the CJEU through a preliminary ruling is ensured. Within this context, in the Avotiņš v. Latvia case the ECtHR considered:

33ECtHR, Bosphorus v. Ireland, op. cit., par. 156.
34ECtHR, Michaud v. France of 6 December 2012, par. 102-104.
35ECtHR, Avotiņš v. Latvia, op. cit., par. 106.

"(...) the Bosphorus presumption existed also because it considered the lack of preliminary ruling by the Latvian Court to be inconclusive, especially in relation to the circumstance that the appellant had not raised any question of interpretation of Art. 34, no. 2 of Regulation CE n. 44/2001 (...)[36].

In theory and in practice, the ECtHR has held a slightly different position from the Bosphorus test, stating that the interpretative path is that of excessive formalism, also taking into account the peculiarities of the control mechanism such as that of preliminary ruling to the CJEU[37]. The protection of human rights by the Latvian judges was not sufficiently lacking and as a consequence the presumption of conformity with the ECHR of the recognition of the sentence does not appear to have been overcome and no violation was attributed to the state[38].

Equally important is the Povse v. Austria (Hazelhorst, 2014; Lazic, 2016) case[39], where the judges stated:

"(...) on compatibility with the ECHR of the decision with which the Austrian judges had ordered the immediate enforceability of an Italian judicial measure ordering the return of a minor victim of international abduction, based on EC Regulation no. 2201/2003 (…)" (Arnardóttir, 2017).

The censorship in this case is invested with the compatibility of a particular hypothesis such as that of abolition of the exequatur with the right to protection of private and family life which is sanctioned by Art. 8 ECHR. The ECtHR was based on the possibility of derogating the presumption of Bosphorus test

36ECtHR, Avotiņš v. Latvia, op. cit., par. 112.

37ECtHR, Avotiņš v. Latvia, op. cit., par. 109.

38ECtHR, Avotiņš v. Latvia, op. cit., par. 124-125.

39ECtHR, Sofia Povse and Doris Povse v. Austria of 18 June 2013; Battista v. Italy of 2 December 2014; Orel v. Croatia of 7 June 2016; Pirozzi v. Belgium of 17 April 2018. Burmych and others v. Ukraine of 12 October 2017; G.I.E.M. Srl and others v. Italy of 28 June 2018.

during the assessment and in the necessary nature of the interference for the realization of the purposes permitted by the conventional provision. This ruling was interpreted as an implicit compliance with the principles of the ECHR and certainly on the path to the abolition of the exequatur procedure (Kramer, 2013). According to the Bosphorus principle[40], the judges of the ECtHR stated that:

"(...) there has been no dysfunction in the control mechanisms set up by the community legal system to protect the fundamental rights safeguarded by the Convention (…). The main argument concerns the absence of discretion on the part of the Member States (…). Art. 42 of Regulation Brussels II bis does not give the judge of the executing Member State any margin of discretion in relation to the exercise of the order imposed by the judge of origin[41] (…). The executing judge limited himself to fulfilling an obligation deriving from from its membership of the Union (…)" (Liakopoulos, 2018)[42].

The Court also investigated the insufficiency of the mechanisms for monitoring compliance with fundamental rights guaranteed by the ECHR. The ECtHR rejected the exception stating that the protection of the ECHR is guaranteed by the possibility granted to the party to assert these rights before the courts of the Member State of origin of the decision relating to the return of the minor by presenting the relevant request for suspension of execution of the return order or by raising the relevant issue in the changed circumstances before the national judge of legitimacy.

40ECtHR, Michaud v. France of 6 December 2012.
41ECtHR, Sofia Povse and Doris Povse v. Austria, op. cit., parr. 79 and 83.
42ECtHR, Sofia Povse and Doris Povse v. Austria, op. cit., parr. 62, 86, 87.

Fair trial, impeding reasons and public order

The reasons that hinder the effects of a decision are given by the fundamental procedural guarantees. Respect for certain procedural guarantees also suggests other impeding reasons which are susceptible to interpretation across the different sectors of judicial cooperation in civil matters. The transversal nature and application can be seen in the Eurofood[43] case where the CJEU elaborately interpreted the public order relationship as a reason for refusal of the recognition and/or enforcement of decisions in civil and commercial matters. This type of transversality is also declared applicable to the reason for refusal provided for by Art. 26 Regulation no. 1346/2000[44] relating to insolvency proceedings[45]. The Court considers as applicable the decisions relating to insolvency procedures as well as the principles enunciated in the Krombach case (Costa, 2017)[46]

43CJEU, C-341/04, Eurofood ISFC Ltd of 2 May 2006, ECLI:EU:C:2006:281, I-03813.

44Regulation (EC) no. 1346/2000 of the Council, of 29 May 2000, relating to insolvency proceedings, in the OJ EC. L 160, of 30 June 2000, p. 1 ss., repealed by Regulation (EU) 2015/848 of the European Parliament and of the Council, of 20 May 2015, relating to insolvency proceedings, cit.

45CJEU, C-341/04, Eurofood ISFC Ltd of 2 May 2006, op. cit.

46CJEU, CJEU, C-7/98, Krombach v. France of 28 March 2000, ECLI:EU:C:2000:164, I-0193, par. 40: "(...) the CJEU noticed the right of the German Court to refuse recognition of a judgment rendered in France was based on a procedural rule which penalized the defendant, preventing him from pursuing his defense if he had not submitted himself in the process. The judgment of the CJEU did not bind the Court to a particular solution to the case (in reality, not to recognize the foreign judgment) but to rule out the non recognition of a breach of the Brussels if, in the Court's view there was a manifest incompatibility of the proceedings before the foreign Court with the fundamental safeguards of the defense. In the same case, the ECtHR, by judgment of 13 February 2001, sentenced France for failing to allow the accused to appear in Court under the French Code of Criminal Procedure, which deprived the defendant of the defense in judgment when an alleged crime was being

which are related to the right to a fair trial. The purpose of these reasons in European international civil procedural law acts is to avoid the importation of a conflict of res judicata within the requested state of execution. The application of these reasons remains residual considering that the formulation of conflicting decisions in the European judicial space should be avoided in advance but only through the general mutual trust of the states and specifically through the rules on the coordination of the exercise of jurisdiction (Liakopoulos, 2019)[47].

The impeding reasons attributed to recognition and enforcement can be seen in the Brussels Ibis Regulation, where the exequatur procedure is abolished and a new legal context must be evaluated where today they are placed in the jurisprudence of the CJEU developed within the Brussels I system.

The violated public order specifies the procedural system of the original system and deals with a serious and intolerable conflict with the principles of international public order. The use of this impeding reason arises only in the specific case where:

"(...) the recognition or execution of the decision pronounced in another contracting state conflicts in an unacceptable way with the legal system of the requested state, as it harms a fundamental principle (...)"[48].

challenged. The CJEU referred to the case law of the ECtHR in defining the refusal to hear the defense of an accused absent from the hearing as a "manifest violation of a fundamental right" (…)".

47See Art. 27, no. 2 of the Brussels Convention and then of Art. 34, no. 2 of the Reg. 44/2001 and Art. 45, par. 1, lit. b) of Regulation 1215/2012.

48CJEU, C-559/14, Rüdolfs Meroni v. Recoletos Limited and others of 25 May 2016, ECLI:EU:C:2016:349, published in the electronic Reports of the cases, par. 42. C-38/98, Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento of 11 May 2000, ECLI:EU:C:2000:225, I-02973, par. 33.

The violation of procedural public order hinders the circulation of decisions where the violation must concern:

"(…) a rule of law considered essential in the legal system of the requested state or a right recognized as fundamental in the same legal system (…)" (Collins, Briggs, Harris, Mcclean, Mclachlan, Morse, (eds), 2012; Stone, 2018)[49].

Interpreting this statement we can say that the violation must be very serious and that it implies such a limit interpreted in a "restrictive" sense[50].

The recognition or execution of the decision relating to the violation of the right of defense as a violation of public order is prohibited in the event that the subject has remained in default and/or has not received notification and/or communication of the judicial request or the related equivalent act

"(…) in good time and in such a way as to be able to present one's defenses (…)" (Liakopoulos, 2019)[51].

The procedural rules violated and relating to the correct notification of the application cannot be invoked as a reason for non-recognizability or non-execution if they could be asserted by the defendant in absentia and in the original jurisdiction. That means that the limit of procedural public order is likely to trigger some procedural defects of a serious nature and is no longer applicable where the defendant is not careful to challenge the sentence in the state of origin counting on the possibility of

49CJEU, C-420/07, Apostolides of 28 April 2009, ECLI:EU:C:2009:271, I-03571, parr. 59-66.

50CJEU, C-559/14, Rüdolfs Meroni v. Recoletos Limited and others, op. cit., parr. 35-42.

51Art. 45, par. 2, lett. b) Regulation n. 1215/2012.

asserting such defects as a challenge to the recognition or the enforcement of the decision in another Member State.

Within this context, we remember the Krombach case from the CJEU relating to the circulation of foreign decisions and "weakening the rights of defence"[52], as we saw in the Gambazzi ruling where the Court specified:

"(...) that the rights of defense can be "compressed" for matters of general interest and such limitations must be proportional to the aim pursued, therefore they must not consist of a "manifest and disproportionate violation of rights" (…)" (Oster, 2015)[53].

The exclusion of Mr. Gambazzi from the judgment constitutes "(...) the most serious possible restriction of the rights of the defense (...) and the justification for this restriction must, therefore, meet very rigorous requirements (...)"[54].

The CJEU takes into consideration the judge of the Member State requested to recognize or enforce a judgment

"(...) for the sole reason that there is a divergence between the legal rule applied by the judge of the Member State of origin and that which he would have applied the judge of the requested Member State if he had been seized of the dispute (…)".

This constitutes a violation of public order. Such divergence can constitute a violation of public order only to the extent that it is detrimental to a fundamental principle[55]. Equally important in the Trade Agency Ldt case it is specified:

52CJEU, C-7/98, Krombach v. France of 28 March 2000, op. cit., parr. 53-54.

53CJEU, C-394/07, Marco Gambazzi v. Daimler Chrysler of 2 April 2009, ECLI:EU:C:2009:219, I-02563, parr. 29-33, the CJEU affirmed: "(...) that the balance to be struck between fundamental rights and public policy was to ensure that the objectives (…) corresponded with the public interest pursued (and were not) disproportionate (…)".

54CJEU, C-394/07, Marco Gambazzi v. Daimler Crysler Canada Inc. and others of 2 April 2009, op. cit., par. 67.

55CJEU, C-619/10, Trade Agency of 5 September 2012, ECLI:EU:C:2012:531, published in the electronic Reports of the cases. C-38/98, Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento of 11 May 2000, op. cit., par. 29.

"(...) that it must be a manifest violation of a rule considered essential in the legal system of the requested Member State or of a right recognized as fundamental in the same legal system (...)"[56].

In conclusion we can say that the failure to justify a decision is also a serious violation of procedural public order. In order to guarantee the defendant the ability to mount a useful and effective defense, the judicial decision must be motivated. As regards the assessment of whether the failure to provide reasons could constitute a violation of public order, an effective case-by-case assessment is necessary, also examining all the relevant circumstances which must be examined to assess whether the decision was issued recognizing procedural guarantees such to allow the interested party the opportunity to actually lodge an appeal. Even in this case the decision is susceptible to recognition and to the absence of motivation[57].

Communication of the application as a prerequisite for the right of defence

One of the major and wide-ranging issues of public order is the connection with the right of defense and when the defendant has been placed in a position to hear about the dispute. We talk about it for communication law as a basis for defense. Greater

56CJEU, C-619/10, Trade Agency Ltd v. Seramico Investments Ltd of 6 September 2012, op. cit., par. 51; C-7/98, Krombach v. France of 28 March 2000, op. cit., par. 37. C-38/98, Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento of 11 May 2000, op. cit., par. 30. C-420/07, Apostolides of 28 April 2009, op. cit., par. 59.

57CJEU, C-302/13, FlyLAL-Lithuanian Airlines AS v. Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS. of 23 October 2014, ECLI:EU:C:2014:2319, published in the electronic Reports of the cases, parr. 50-54.

importance is given to the execution of a judgment in absentia. In this case it is necessary to check whether the request initiating the proceedings was communicated in sufficient time to allow one to defend oneself and to challenge the decision taken in one's absence.

The regularity of the notification must necessarily be assessed for the communication coming from the state of origin. The defendant must be guaranteed a suitable period of time to begin the exercise of the right of defense and the assessment of fact[58]. The relevant provision issued by the state of origin does not exempt the judge of the requested state from the obligation to proceed with the examination of the second condition and in the event that this provision was requested for the regularity of the notification or communication. Once the judge has decided on the regularity of the notification or communication, the defendant can present his defense and be subsequently examined by the requested state[59]. In this case the CJEU has already stated that:

"(...) it is not necessary to have proof that the defendant actually had knowledge of the judicial request (...) the judge must only assess that, following the regular notification or communication, the defendant can begin to act to defend its interests at the moment in which the document has been notified or communicated (…). The judge of the requested state must ascertain whether, in the specific case, exceptional circumstances exist which

58CJEU, C-166/80, Klomps v. Karl Michel of 16 June 1981, ECLI:EU:C:1981:137, I-01593, par. 14 ss. C-283/05, ASML Netherlands BV v. Semiconductor Industry Services GmbH (SEMIS.) of 14 December 2006, ECLI:EU:C:2006:787, I-12041, par. 40.

59CJEU, C-166/80, Klomps v. Karl Michel of 16 June 1981, op. cit., parr. 15-16.

lead to the conclusion that the notification or communication, although regular, was however not sufficient to enable the defendant to begin to defend himself (...)"[60].

As regards the time necessary for the defendant to arrive, it begins to run from the moment the notification was delivered to his domicile, residence. Even in this case the CJEU stated:

"(...) the judge of the requested Member State has full freedom of appreciation in ascertaining, on the one hand, that the plaintiff has taken every useful initiative to ensure that the defendant has received the necessary information and, on the other hand, that, even in the presence of a regular notification of the application, the defendant was placed in a position to fully defend himself (...)"[61].

The content of the document allows the defendant to extract the relevant information necessary to know the subject matter of the dispute and the related arguments invoked by the plaintiff, as well as knowing the judgment in his own area and being able to assert the relevant necessary defenses[62]. The absence of one of the above conditions is sufficient to justify the refusal of recognition[63].

The verification of the regularity of the notification of the document and its content has its own importance given that it is necessary to recognize a decision issued according to Regulation EC n. 805/2004. A procedural event such as failure to appear in court has the consequences of another procedural principle which is that of ficta confessio. Also in this case the CJEU

60CJEU, C-166/80, Klomps v. Karl Michel of 16 June 1981, op. cit., parr. 17-21.

61CJEU, C-166/80, Klomps v. Karl Michel of 16 June 1981, op. cit., par. 19.

62CJEU, C-14/07, Ingenieurbüro Michael Weiss und PartnerGbR v. Industrie-und Handelskammer Berlinpar of 8 May 2008, ECLI:EU:C:2008:264, I-03367, parr. 64 and 73.

63CJEU, C-123/91, Minalment GmbH v. Brandeis Ldt. Of 12 November 1992, ECLI:EU:C:1992:432, I-05661.

(Jelinek, Zangl, 2017)[64] decided:

"(...) that this can happen exclusively in the case in which the defendant's rights of defense have been effectively protected which fall within compliance with those "minimum requirements" on which said Regulation is based (...)".

In particular, in the Krombach case the CJEU:

"(...) held that the circulation of foreign decisions cannot occur by "weakening the rights of the defence" (...)"[65].

The CJEU makes a clear distinction between the right to communication of relevant documents and proceedings and the right to be heard. In the Eurofood ruling the CJEU states:

"(...) that even in the procedures governed by EC Regulation no. 1346/2000 recast by EU Regulation no. 2015/848 the right to obtain communication of the procedural documents, and more generally the right to be heard (...) occupy a prominent place in the organization and conduct of a fair trial (…). In the context of insolvency, the right of creditors or their representatives to participate in the procedure in compliance with the principle of equality between the parties is of particular importance (…). Any restriction of this right must be adequately justified and accompanied by procedural guarantees that ensure the interested parties from such a procedure the actual possibility of contesting the measures (...)"[66].

If this is true in finis we can say that:

64CJEU, C-511/14, Pebros Servizi Srl v. Aston Martin Lagonda Ltd v. Aston Martin Lagonda Ltd of 16 June 2016, ECLI:EU:C:2016:448, published in the electronic Reports of the cases , which the CJEU has stated that: "(...) the default judgment was to be counted among the executive title that were to be certified as a European enforcement order, even if it could not, in fact, to be certified as a European enforcement order the pronouncement pronounced in absentia when it was impossible to identify the domicile of the defendant also for the purposes of notification (...)". And in case of monitor process see: C-133/12, Goldbet Sportwetten v. Massimo Sperindeo of 13 June 2013, ECLI:EU:C:2013:105; C-215/11, Iwona Szyrocka v. SiGer Technologie GmbH of 13 December 2012, ECLI:EU:C:2012:794; joined cases C-119/13 and C-120/13, Eco Cosmetics GmH v. Virgine Laetitia Barbara Dupuy and Tetyana Bonchyk of 4 September 2014, ECLI:EU:C:2014:2144; C-245/14, Thomas Cook Belgium NV v. Thurner Hotel GmbH of 22 October 2015, ECLI:EU:C:2015:715; C-94/14, Flight Refund Ltd vs. Deutsche Lufthansa AG of 10 March 2016, ECLI:EU:C:2016:148, the above cited cases published in the electronic Reports of the cases; C-292/10, G. v. Cornelius de Visser pf 15 March 2012, ECLI:EU:C.2012:142, published in the electronic Reports of the cases.

65CJEU, C-7/98, Krombach v. France of 28 March 2000, op. cit., parr. 43-44.

66CJEU, C-341/04, Eurofood ISFC Ltd of 2 May 2006, op. cit., par. 66.

"(...) a Member State can refuse (...) to recognize an insolvency procedure opened in another state if the opening decision was taken in manifest violation of the fundamental right to be heard enjoyed by a person affected by such a procedure (…). It is true that the requested state will have to evaluate, in concrete terms, such incompatibilities on the basis of the set of circumstances in which the trial took place in the state of origin, and not also on the basis of a slavish and formal application of the methods through which the cross-examination takes place and is guaranteed in its own legal system (...)"[67].

In the Gambazzi case the CJEU's right to obtain communication of the procedural documents and to be heard remained valid[68]. This is a particular case given that the CJEU had to:

"(...) evaluate the compatibility or otherwise with community principles of typical institutions of the common law system (…)".

Mr. Gambazzi had been the recipient of, among other things, a disclosure order from the English High Court of Justice which ordered the disclosure of certain information relating to certain assets and the production of documents relating to the main application. Having failed to comply with it, the English Court issued a further provision which would have prevented him from participating in the proceedings if he had not complied with the obligation to appear within the deadline set. Following the failure to comply, the High Court found Gambazzi guilty of contempt of Court and excluded him from the proceedings which were led to the witch of a trial in absentia and concluded with Gambazzi being sentenced to compensation for the damages claimed by the plaintiffs. Enforcement of the ruling issued by the High Court has been requested in several states,

67CJEU, C-341/04, Eurofood ISFC Ltd of 2 May 2006, op. cit., par. 67.

68CJEU, C-394/07, Marco Gambazzi v. Daimler Chrysler of 2 April 2009, op. cit., par. 33.

Italy, France (which apply Regulation EC no. 44/2001 and are part of the ECHR) and Switzerland and the Principality of Monaco (which do not apply Regulation EC no. 44 /2001 but are part of the ECHR) with different implications[69].

According to our opinion the exclusion measure was objectively serious and had been adopted in compliance with the rights of defense and cross-examination to allow the correct administration of justice while respecting the proportionality between the behavior of the parties and the related sanction which applied therefore that the justification for this restriction must meet very rigorous requirements[70]. The CJEU stated that even a measure like that English should not violate the principles of fair trial by leading to the exclusion of a party to the proceedings who has been adequately informed of the consequences of his or her procedural behavior and whether the exclusion order can be challenged. The presumption of regularity of decisions rendered in others Member States is to be considered important due to the burden of proving failure to respect one's right of defense in court and which challenges the recognisability of the decision issued in the proceedings in which it remained in absentia. Recognition may also be made by the other party who is able to prove despite the irregularity of

69CJEU, C-394/07, Marco Gambazzi v. Daimler Chrysler of 2 April 2009, op. cit., par. 34.

70CJEU, C-394/07, Marco Gambazzi v. Daimler Chrysler of 2 April 2009, op. cit., par. 67.

the proceedings and having seen that "the defendant has unequivocally accepted the decision"[71].

We remind, that one of the cornerstones concerning the right of defense is the minor's right to be heard as provided for by Art. 42 Regulation EC n. 2201/2003 relating to rulings that have to do with the return of the minor unlawfully detained. The same right is also recognized by Art. 7, letter. 3 of the Convention of the Hague of 25 October 1980 on the civil aspects of international child abduction as well as the report on the request for the return of the child from abroad who has been unlawfully abducted, providing that the judge may decide to hear the child[72].

The Convention of the Hague itself through art. 13 has established the refusal through the judicial or administrative authority to allow the return of the minor:

"(...) if it ascertains that the minor opposes the return, and that he has reached an age and a degree of maturity such that it is appropriate to take his opinion into account (...)" (Queirolo, 2022)[73].

Through this type of rules we note the judges' duty to consult personally or through different subjects the minor who presents sufficient concrete discernment. The judge can exclude the relevant hearing only if it is manifestly in conflict with the superior interests of the minor himself and taking into account

71CJEU, C-394/07, Marco Gambazzi v. Daimler Chrysler of 2 April 2009, op. cit., par. 34.

72CJEU, C-82/16, K.A. and others of 8 May 2018, ECLI:EU:C:2018:308, published in the electronic Reports of the cases.

73Art. 13 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

his own level of maturity, rules which in reality come from the civil system of the national law of every democratic state. The hearing means at the same time the judge's duty to consult personally or through different parties the minor who presents sufficient discernment to evaluate whether the relevant information harms his or her well-being.

In the case of execution of a certified decision on the return of a minor, the judge of origin would have transgressed that Art. 42 of the Regulation may verify a serious violation of human rights since the minor has not been heard in this regard. The CJEU remained faithful to this line of thought and did not deny such an established violation but reserved that this examination is specified by Art. 42, no. 2, par. 2 and does not authorize the judge of the Member State of origin compromising the useful effect of the system established by the Regulation (Biagioni, 2012; Liakopoulos, 2019)[74].

According to Regulation n. 2201/2003, the control of legitimacy of the decision on return is entrusted to the Member State of origin calling for a violation of the minor's right to be heard (Kramer, 2013)[75]. In this case the CJEU ruled out that:

"(...) the judge of the Member State of execution can examine a certified decision requiring the return of the minor and oppose its execution, complaining of the violation of the fundamental right of these to be heard, given that the protection of this right would in fact be guaranteed by the

74CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga v. Simone Pelz of 22 December 2010, ECLI:EU:C:2010:828, I-14247.

75CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga v. Simone Pelz of 22 December 2010, op. cit., parr. 69 and 73.

system of judicial remedies of the law of the Member State of origin (...)"[76].

In this case the appellant had not yet exhausted all the procedural remedies that are available in that state. We understand that the limit of procedural public order is susceptible to the presence of particularly serious procedural defects and the defendant is not careful to challenge the sentence in the state of origin while remaining on the possibility of asserting certain defects during the contestation of the recognition or enforcement of the decision in another Member State.

The ECtHR in Avotiņš v. Latvia case stated:

"(…) Art. 6 ECHR requires the ad quem judge, even if it is of last instance, to verify ex officio whether effective remedies exist in the country of origin to remove the default judgment and obtain a review of the dispute (...) the appellant had not challenged the default judgment in the original system although this remedy was provided for by the system (…)"[77].

The obligation to state reasons as part of the right of defence

As we have noted, the ECtHR has highlighted the lack of motivation when a sentence is pronounced following a cognitive judgment that violates Art. 6 ECHR and recognizes the connection with the motivation and effective exercise of the right of defence. A fair trial imposes on judges an obligation to give reasons for the sentence which is not merely formal. The reasoned decision should also have some specific

76CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga v. Simone Pelz of 22 December 2010, op. cit., par. 74.

77ECtHR, Avotiņš v. Latvia of 23 May 2016, par. 47.

characteristics. One of the key points is that the sentence must have the construction of the facts and the logical-legal reasoning that led the judge to decide is not enough[78]. Judges are not required to justify the rejection of every reason put forward by the party and have the obligation to examine and respond accordingly[79].

However, as far as the jurisprudence of the CJEU is concerned, the failure to justify a decision constitutes a violation of procedural public order. The obligation to give reasons for judicial decisions allows the losing party to understand the reasons and above all the right to appeal in a useful and effective way. In particular, in the Trade Agency case, a decision that was issued in absentia

"(...) resolves a dispute on the merits, but does not examine either the object or the basis of the appeal and is devoid of any argument on the validity of this lastly (…)".

The Latvian Court asks whether this decision, which in its opinion violates the defendant's right to a fair trial, enshrined in Article 47 CFREU, is capable of being recognized and, therefore, enforced pursuant to Regulation EC no. 44/2001

"(…) responded that respect for the right to a fair trial requires that any judicial decision be motivated, in order to allow the defendant to understand the reasons for which he was convicted and to appeal against that decision in a useful and effective manner (...)[80].

78ECtHR, Higgins v. France of 12 February 1998; Markoulaki v. Greece of 26 July 2007; Vyerentsov v. Ukraine of 11 April 2013.

79ECtHR, Moreira Ferreira v. Portugal (n. 2) of 11 July 2017, par. 84.

80CJEU, C-619/10, Trade Agency of 5 September 2012, op. cit., par. 53.

The judge of the requested Member State may consider, in principle, that a decision issued in absentia which does not examine the object, the basis, as well as the validity of the action, constitutes a limitation of a right fundamental in the legal order of that Member State[81].

In the same spirit is the fly LAL Lithuanian Airlines AS case which is based on the lack of motivation for the methods:

"(...) of determining the amount of the sums on which the provisional and precautionary measures ordered by the decision for which recognition and execution (...)"

respect the right to a fair trial requiring that any judicial decision be motivated, in order to allow the defendant to understand the reasons for which he was convicted and to appeal against this decision in a useful and effective manner (Jacob, 2016)[82].

It is noted that the obligation to state reasons "may vary depending on the nature of the judicial decision in question".

It must be analyzed in relation to the proceedings considered as a whole and on the basis of all the relevant circumstances, taking into account of the procedural guarantees by which this decision is surrounded, in order to verify whether the latter guarantee interested parties the possibility of appealing against said decision in a useful and effective manner (Jacob, 2016)[83].

81CJEU, C-619/10, Trade Agency of 5 September 2012, op. cit., par. 54.

82CJEU, C-302/13, FlyLAL-Lithuanian Airlines AS v. Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS. of 23 October 2014, op. cit., par. 51.

83ECtHR, Hirvisaari v. Finland of 27 September 2001; Beg Spa v. Italy of 20 May 2021; Catană v. The Republic of Moldova of 21 February 2023; Paun Jovanović v. Serbia of 07 February 2023. Test-Achats v. Belgium of 12 December 2022; Dolenc v. Slovenia of 20 October 2022; Žurek v. Poland of 16 June 2022; Xavier Lucas v. France of 09 June 2022; Nalbaut and others v. Turkey of 3 May 2022.

In the Trade Agency case, the no less important problem emerges of the difference between the control on the motivation which is admissible and the relative review of the merit which is always prohibited by the European legal system according to the principle of mutual trust between the relations of the Member States. It should be noted that the control on the motivation involves a check on the logic between the Member States. It highlights how the control over the motivation involves a verification of the logic of the procedure followed by the judge and is instrumental to the right of defence. As regards the review, it constitutes a new verification regarding the factual and legal elements as well as the evidence in order to arrive at a new, different reconstruction of the case.

Concluding remarks

The jurisprudential interpretations produced by both the CJEU and the ECtHR relating to the clarification of the content of procedural public order and the violation of fundamental rights protected by reasons hindering the recognition and enforcement of decisions in the European judicial space.

According to the CJEU and the related preliminary interpretation of the rules of private international law referred to from time to time has further strengthened the guarantees in the

European judicial space as well as the legal certainty in inter-individual relationships between private individuals. It is clear from the jurisprudence of the CJEU that we have seen that the judges of the Luxembourg are based on the need to strengthen the factor of mutual trust between Member States which is necessary to ensure the effectiveness of the rules of international civil procedural law.

With regard to the acts of secondary law adopted to implement the relevant principle of mutual recognition of decisions, it is guaranteed that respect for fundamental rights as well as compliance according to the principles established by the CFREU, protection and the right to an effective remedy to a impartial judge (Craig, De Bùrca, 2021)[84], a right that is part of the right of fair trial. The rulings of the CJEU regarding the recognition and enforcement of decisions have highlighted the protection of fundamental rights which is guaranteed through the use of substantive and procedural public order control mechanisms. From a negative point of view we can say that procedural public order constitutes a limit to the recognition and execution of the relevant decisions made by the judges of other Member States and has the objective of protecting national identities.

84See recital n. 38 of Regulation n. 1215/2012 and the recital n. 83 of Regulation n. 2015/848.

As regards a positive profile, it can be read as a tool that favors the process of procedural integration of the European Union (Liakopoulos).

If a European judicial area moves towards judicial cooperation based on the principle of mutual recognition, the relevant restrictions on movement must be applied restrictively. The CJEU has sought to undermine the uniformity of the protection of the right to a fair trial in the Member States of the EU. The judges of the Luxembourg have established the relevant specific criteria in order to balance the principles of procedural public order with other meritorious interests of protection. The judges of the CJEU have put national judges in front of the decision on the execution or recognizability or not of a judicial decision coming from another Member State as well as the obligation to administer justice and the effectiveness of judicial measures. The actual extent of the assessment that the national judge had to carry out and highlight the principles of public order of the forum likely to prevent the entry of judicial products coming from other states of the European Union remains the freedom of the states to determine:

"(…) the needs of their public order within (…) the limits permitted by the European Union law (…) establish the conditions under which national judges can use this notion to deny access, in their own law, to a foreign decision (...)"[85].

The limit of public (procedural) order can only be invoked if there is a manifest violation of a rule considered essential or of a right recognized as fundamental in the legal system of the requested Member State.

"(…) Any assessment of the limits to mutual recognition would be conditional on the prior exhaustion of the jurisdictional remedies provided by the law of the Member State of origin (...)"[86].

At the same time, the ECtHR has offered us a restrictive approach regarding the application of the reasons preventing the mutual recognition of decisions. All types of violations of procedural guarantees found by the ECtHR become part of the procedural public order of the EU where Member States cannot recognize the execution of a decision that produces effects incompatible with the ECHR. Procedural public order constitutes the limit for the free circulation of the foreign decision that was issued as a consequence of a proceeding that did not respect the guarantees of art. 6 ECHR and the related criteria and parameters indicated by the ECtHR itself.

The ECtHR has operated as a guarantor of fundamental rights in states that belong to the European judicial area and has intervened less than the judges of the Luxemburg towards the application of the principle of equivalent protection to a sector

85CJEU, C-7/98, Krombach v. France of 28 March 2000, op. cit., parr. 22-23.
86CJEU, C-7/98, Krombach v. France of 28 March 2000, op. cit., par. 24.

such as that of judicial cooperation in civil matters based on mutual trust between Member States. From a jurisdictional point of view, the EU is capable of ensuring the protection of fundamental rights, also including the guarantees of a fair trial. In the European judicial space, the states require the assumption that fair trial rights have been respected in the state of origin of the decision. A person believes that their fundamental procedural rights have been violated, providing evidence of blocking the automatic enforcement of the decision. This allows the requested state of execution to be recognized and to avoid checking whether the state of origin has respected the rights of fair trial by applying the presumption of Bosphorus case which has violated one of the objectives of the ECHR, i.e. a practical and effective protection of fundamental rights. Therefore, in the Avotiņš v. Latvia case the ECtHR has complied with the application of the presumption of conformity by stating that the supervision mechanism that has been foreseen by the EU must be applied without other formalisms.

Mutual trust and mutual recognition of decisions within the European judicial area are based on equivalence with the ECHR. We could say that the control of the ECtHR could be considered reduced given that it guarantees control by the CJEU through the jurisdictional remedy of the preliminary ruling. It is believed

that also in the matter of the free circulation of decisions, it is confirmed that both Courts play a role in guaranteeing fundamental rights in the European judicial space.

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